86-496

Supreme Court, U.S.
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No.

In the Supreme Court of the United States

October Term, 1986

VOLKSWAGEN OF AMERICA, INC.,
Petitioner,

v.

ANGELINE S. PROTOS,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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QUESTIONS PRESENTED

1. Whether the religious accommodation provision of Title VII of the Civil Rights Act of 1964, which compels a private employer to accommodate absences caused by an employee's religion, violates the Establishment Clause of the First Amendment to the United States Constitution?

2. Whether Title VII of the Civil Rights Act of 1964 requires an employer to give to a Sabbatarian worker an absolute guarantee to be excused from all Saturday work, even though several of that worker's prior Saturday absences occurred when the pool of available substitutes had been depleted and the employer had experienced efficiency and production problems?

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

The Petitioner Volkswagen of America, Inc. ("VWoA")[1] respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Third Circuit, entered in the above-entitled proceeding on July 29, 1986.

OPINIONS BELOW

The Opinion of the Court of Appeals for the Third Circuit is reported at 797 F.2d 129, and appears in Appendix A hereto.

The August 27, 1985 Findings of Fact and Conclusions of Law of the United States District Court for the Western District of Pennsylvania are reported at 615 F. Supp. 1513, and appear in Appendix B hereto. The District Court's subsequent decision denying VWoA's motion to

[1]Pursuant to Rule 28.1, VWoA discloses that it is a wholly-owned subsidiary of Volkswagenwerk AG, a West German corporation. VWoA is not affiliated with any other publicly owned corporations.

amend or reconsider the judgment is unreported, and appears in Appendix C hereto.

JURISDICTION

The Court of Appeals issued its Opinion and Judgment on July 29, 1986. This Petition is filed within 90 days of that date. This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISION INVOLVED

The Establishment Clause of the First Amendment provides: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. . . ."

Section 701(j) of Title VII of the Civil Rights Act of 1964, as amended in 1972, 42 U.S.C. § 2000e(j), provides:

> The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

Section 703(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), provides in pertinent part:

> It shall be an unlawful employment practice for an employer . . . to . . . discharge an individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . religion . . . .

STATEMENT UNDER RULE 28.4(b)

This proceeding draws into question the constitutionality of Section 701(j) of the Civil Rights Act of 1964, 78 Stat. 255, as amended by Section 2(7) of the Equal Employment Opportunity Act of 1972, 86 Stat. 103, 42 U.S.C. § 2000e(j) (1984), and Section 703(a)(1) of that Act, 78 Stat. 255, 42 U.S.C. § 2000e-2(a)(l) (1984), both of which are Acts of Congress affecting the public interest. Because neither the United States nor any agency, officer, or employee thereof is a party, it is noted that 28 U.S.C. § 2403(a) may be applicable.

No court of the United States as defined by 28 U.S.C. § 451 has, pursuant to 28 U.S.C. § 2403(a), certified to the Attorney General the fact that the constitutionality of such Acts of Congress has been drawn into question.

STATEMENT OF THE CASE

This case, commenced under Title VII of the Civil Rights Act of 1964, involves the legality of VWoA's discharge of Angeline Protos because of her refusal to work mandatory overtime on Saturdays in connection with her employment as an assembly line worker at VWoA's automobile assembly plant in New Stanton, Pennsylvania. Mrs. Protos refused to work Saturdays because of her membership in the Worldwide Church of God, a religious denomination whose members believe that it is a sin to perform any work between the hours of sundown Friday and sundown Saturday.

Mrs. Protos was hired as an assembly worker by VWoA on May 9, 1979. In August, 1979, VWoA notified all its employees that mandatory Saturday overtime would be scheduled on a significant number of Saturdays during

the upcoming months. Shortly thereafter, Mrs. Protos approached her supervisor and gave him a note advising him that she was a member of the Worldwide Church of God, and that the tenets of that religion precluded her from working on Saturdays. In response, her supervisor advised her that although he could probably give her several Saturdays off, he did not believe he could give her an absolute guarantee to take off every Saturday. Subsequently, Mrs. Protos produced additional notes from her minister, which emphasized that "there were no exceptions" to the Worldwide Church of God belief that precluded Saturday work.

Saturday overtime work was scheduled on September 22, October 6 and October 13. Mrs. Protos was absent from work on each of these Saturdays, but was not disciplined pending VWoA's investigation. When Mrs. Protos was absent from work on the next scheduled Saturday, November 3, 1979, VWoA decided that the continued absences of Mrs. Protos from work on Saturdays could not always be accommodated. By that date, VWoA had experienced efficiency and staffing problems on Saturdays, caused by high Saturday absenteeism[2] and depletion of the pool of substitute workers available for absentee replacement. Mrs. Protos was informed that future absences would be treated as unexcused, and that she would be subject to VWoA's progressive discipline system. Mrs. Protos again reiterated her position that she required an

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[2]Absenteeism on Saturdays—both plantwide and in the Trim Department where Mrs. Protos was employed—was double and triple the average absenteeism experienced during the regular Monday-Friday workweek. Specifically, during the September-December 1979 period, absenteeism for the Saturdays on which production was scheduled was as follows:

(Continued on next page)

"absolute guarantee" to be excused from work on *all* Saturdays, and that nothing less would be acceptable. Consistent with that position, Mrs. Protos was absent on each of the subsequent Saturdays on which mandatory overtime was scheduled, including December 8, 1979 and February 2, February 23 and March 15 of 1980, and was disciplined in accordance with VWoA's progressive discipline system.[3] She was discharged on March 17, 1980 following the March 15, 1980 absence.

(Continued)

Date	Saturday Plantwide Absences	Saturday Trim Department Absences
09/22/79	127	20
10/06/79	120	17
10/13/79	141	27
11/03/79	147	29
12/08/79	100	15

During the same period, the average absenteeism for both the plant and the Trim Department was significantly lower:

Month	Average Absenteeism Plantwide	Average Absenteeism Trim Department
September	73	12.5
October	66	12.6
November	54.6	10.8
December	87	17.9

See Defendant's Trial Exhibit I, reproduced at pages 925-930 of Joint Appendix filed in the Court of Appeals.

[3]During this period, VWoA investigated the possibility of transferring Mrs. Protos to a position in which overtime would not be required, but found that a waiting list of 200 more senior employees existed for transfer to such a position. Thus, VWoA could not transfer Mrs. Protos without a waiver from the employees' collective bargaining agent, the United Auto Workers of America. On February 1, 1980, VWoA requested the union to grant such a waiver, but this request was refused.

During the nonjury trial held to adjudicate Mrs. Protos' claim that her discharge violated the religious discrimination prohibition of Title VII, VWoA presented evidence as to the hardship encountered with respect to Mrs. Protos' Saturday absences, and evidence as to why it could not reasonably accommodate Mrs. Protos' demand for an absolute guarantee never to work Saturdays without incurring more than a *de minimis* expense. The evidence presented by VWoA included the undisputed fact that on three of the eight Saturdays scheduled by VWoA during the September, 1979 through March, 1980 period, absenteeism was so high that the pool of absentee replacement operators ("AROs") maintained by VWoA for absentee substitution was totally depleted. On those Saturdays, which included September 22, 1979, November 3, 1979 and December 8, 1979, it was necessary to shut down the production lines for "mass relief," resulting in 18 minutes lost production in the morning and 18 minutes lost production in the afternoon.[4]

VWoA also presented testimony from the department supervisor and the area coordinator in Mrs. Protos' area,

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[4]Tag relief operators normally were employed for purposes of giving assembly line workers their 18-minute relief period prior to lunch and 18-minute relief period after lunch. Under the tag relief system, tag relief operators had responsibility for relieving six assemblers plus themselves in the morning and afternoon. The alternative to tag relief was mass relief, under which the entire production line is shut down for 18 minutes in the morning and afternoon in order to permit all assembly line workers to take their relief breaks at the same time. Mass relief resulted in production of approximately 36 fewer cars during a particular shift, and was therefore undesirable during the 1979 period when the VWoA assembly facility was operating at peek capacity. Nevertheless, when absenteeism was so high that the ARO pool was depleted, VWoA would have no choice but to use mass relief instead of tag relief, thereby creating a pool of available employees (the tag relief operators) to substitute for absent employees for an entire shift.

both of whom testified about efficiency problems in the department, and increased repairs specifically related to the tail light wiring job normally performed by Mrs. Protos.[5] The department supervisor also testified about complaints received from other employees concerning Mrs. Protos' absenteeism. These employees desired to take certain Saturdays off, and complained that Mrs. Protos was able to be absent on Saturdays, while they were required to be present. This dissension had led to employee morale problems and discipline problems in VWoA's relationship with union representatives, who complained to VWoA's supervisors that other employees absent on Saturday could not be disciplined unless Mrs. Protos was disciplined.

On July 29, 1985, the District Court issued Findings of Fact and Conclusions of Law and entered judgment in favor of Mrs. Protos and against VWoA. In ruling in favor of Mrs. Protos, the District Court rejected VWoA's argument, based upon the Fourth Circuit's decision in *Jordan v. North Carolina National Bank,* 565 F.2d 72 (4th Cir. 1977), that as a matter of law Mrs. Protos' demand for an "absolute guarantee" of never working Saturdays could not be accommodated without undue hardship. The District Court rejected the rationale of *Jordan,* instead stating

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[5]Testimony concerning the increased repairs and efficiency problems encountered on the Saturdays missed by Mrs. Protos was consistent with the higher Saturday absenteeism experienced plantwide, and with the general testimony presented as to the difficulty a substitute employee had in performing a newly assigned job at 100% production rate. Mrs. Protos herself admitted that the most difficult aspect of her job was in learning to complete all aspects of the job (which involved connecting wires in the tail light assembly) quickly enough to complete the job in the 55 seconds allotted; an employee who had never performed that job obviously would miss vehicles and generate increased repairs.

that it found the dissenting opinion in that case to be a "better analysis." (App. B at 11-12).

As to VWoA's evidence of undue hardship, the District Court ruled that VWoA had failed to sustain its burden of establishing hardship because it had not demonstrated "any economic losses" flowing from Mrs. Protos' absences, instead finding that "the end product was not affected by the absence of plaintiff." (App. B at 5). The District Court's findings were premised upon its belief that VWoA had available to it absentee relief operators and other substitutes to replace Mrs. Protos, notwithstanding the undisputed fact discussed *supra* that on three of the eight Saturdays missed by Mrs. Protos, the pool of AROs was depleted because of excessive Saturday absenteeism. *Id.*

Finally, the District Court rejected VWoA's argument that the reasonable accommodation provision of Title VII constituted an establishment of religion in violation of the Establishment Clause, noting that various courts of appeals had rejected this argument and that it saw no reason to deviate from those holdings. (App. B at 13).

On appeal, the Third Circuit affirmed the District Court's rulings with respect to the undue hardship issue as well as with respect to VWoA's constitutional challenge to the reasonable accommodation provision of Title VII. Treating the undue hardship issue as purely a factual determination, the Court of Appeals admitted that although it was "inclined to believe the hardship question was considerably closer than the District Court did," it could not say that the court's factual determinations were clearly erroneous under Rule 52(a) of the Federal Rules of Civil Procedure. (App. A at 10). Again, like the District Court, the Court of Appeals did not even mention the undisputed fact

that on three of the eight Saturdays missed by Mrs. Protos, the pool of available substitute AROs was depleted.

The Court of Appeals also expressly declined to follow the Fourth Circuit's decision in *Jordan v. North Carolina National Bank*, which held that a demand for every Saturday off was "so unlimited and absolute in scope. . . that (it) speaks its own unreasonableness and is thus beyond accommodation." 565 F.2d at 76. The Third Circuit noted that *Jordan* had not been followed by other appellate courts, and that it agreed with the District Court's rejection of the Fourth Circuit's holding in *Jordan*. (App. A at 8-9).

Finally, the Court of Appeals rejected VWoA's argument that the reasonable accommodation provision of Title VII violated the Establishment Clause by requiring an employer to accommodate an employee's religious-based absenteeism while not requiring such accommodation for absences caused by secular reasons. (App. A at 11-15). Notwithstanding this Court's decision in *Estate of Thornton v. Caldor, Inc.*, 105 S.Ct. 2914 (1985), the Court of Appeals concluded that the primary effect of Title VII's reasonable accommodation provision was that of "promoting freedom of conscience and prohibiting discrimination in the workplace," and that the admitted benefit to religion flowing from that statutory provision was incidental to this central purpose. (App. A at 14-15).

REASONS FOR GRANTING THE WRIT

I. The Court Of Appeals Has Incorrectly Decided An Important Issue Of Constitutional Law In A Manner Inconsistent With This Court's Decisions Under The Establishment Clause.

In 1972, Congress amended Title VII's religious discrimination prohibition to include a requirement that an employer must reasonably accommodate an employee's religious beliefs and practices unless the employer can demonstrate that the accommodation would result in "undue hardship." Ever since this amendment, a recurring issue in religious discrimination litigation has been whether the reasonable accommodation provision violates the Establishment Clause of the First Amendment. This issue was presented to the Court in *Trans World Airlines v. Hardison,* 432 U.S. 63 (1977), but was not reached because of the Court's disposition of that case on statutory grounds.

In *Estate of Thornton v. Caldor, Inc.,* 105 S.Ct. 2914 (1985), this Court ruled that a Connecticut statute which provided Sabbath observers with an absolute right not to work on their Sabbath violated the Establishment Clause. This Court ruled that the Connecticut statute did not pass muster under the three-part *Lemon v. Kurtzman* test because it had the primary effect of advancing a particular religious practice, i.e., Sabbath observance.

The rationale applied in *Thornton* applies with equal force to adjudication of the constitutionality of Section

703(j), notwithstanding the "absoluteness" of the Connecticut statute at issue in that case.[6] Like the statute at issue in *Thornton,* Section 701(j) has a primary effect of advancing religion, by requiring employers to accommodate the request of an employee to be absent from work if the reason for such absence is the employee's religion, while not requiring such accommodation for absences caused by non-religious reasons. The Court of Appeals acknowledged that Section 701(j) confers a "benefit" on religion by requiring VWoA to accommodate Mrs. Protos' religious practices but not the desires of one of her co-workers to spend a particular day with his or her family. (App. A at 14-15). It follows from that conclusion that Section 701(j) violates the Establishment Clause, because the class of recipients of this "economic benefit" is defined exclusively on the basis of religion.

This Court's decisions have consistently held that a law which, on the basis of religion, "singles out a class of. . . citizens for a special economic benefit" has a legislative effect the Establishment Clause was expressly intended to forbid. *Sloan v.Lemon,* 413 U.S. 825, 832 (1973). In *Everson v. Board of Education,* 330 U.S. 1, 9-14 (1947), Justice Black wrote that the First Amendment "requires the state to be neutral in its relations with groups of religious believers and non-believers," *id.* at 18, and that under the Establishment Clause,"[n]either a state nor the

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[6]The extent or amount of benefit to religion created by governmental acts has never been viewed as a factor to be used to uphold the constitutionality of an otherwise offensive statute. *See School District of Abington Township v. Schempp,* 374 U.S. 203, 225 (1963) ("it is no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment").

federal government. . . can pass laws which aid one religion, which aid all religions, or prefer one religion over another." *Id.* at 15.

Accordingly, this Court has struck down every statute conferring an economic benefit exclusively upon members of particular religious sects, or upon members of all religions to the exclusion of non-religionists. *See, e.g., Thornton, supra,* 105 S.Ct. 2918; *Committee for Public Education v. Nyquist,* 413 U.S. 756, 793-794 (1973); *Sloan, supra,* 413 U.S. at 830-832; *Meek v. Pittenger,* 421 U.S. 349, 364-365 (1974). Conversely, the constitutionality of statutes has been upheld where the economic benefit is conferred upon a broader class of recipients which incidentally includes religious interests, on the theory that the benefit conferred upon religion is incidental to some broader purpose underlying the statutory scheme. *E.g., Witters v. Washington Department of Services for the Blind,* 106 S.Ct. 748 (1986); *Mueller v. Allen,* 463 U.S. 388, 397-398 (1983); *Roemer v. Maryland Public Works Board,* 426 U.S. 736, 746 (1976); *Board of Education v. Allen,* 392 U.S. 236, 242-243 (1968); *Everson, supra,* 330 U.S. at 17.

In upholding the constitutionality of Section 701(j) in the instant case, the Court of Appeals erroneously relied upon decisions such as *Gillette v. United States,* 401 U.S. 437 (1971), which deal with the constitutionality of exemptions from governmental conduct or requirements which would otherwise adversely impact an individual's ability to practice his religion. (*See* App. A at 15.) Reliance upon such decisions is misplaced in the context of adjudication of the constitutionality of Section 701(j), a statute which affirmatively requires a private employer to reasonably accommodate an employee's religious beliefs, and which does not implicate governmental activity in any way. *See*

Thornton, supra, 105 S.Ct. at 2918-2919 (O'Connor, J., concurring).

The constitutionality of Section 701(j) is a recurring issue which should be definitively resolved by this Court. As the Solicitor General argued in support of the granting of the petition for a writ of certiorari in *Thornton v. Caldor*:

> "We believe it is time that the question of the constitutional propriety of laws requiring religious accommodation in the workplace be resolved. An authoritative determination by this Court will remove any impediment to voluntary compliance that lingering doubts about Title VII's constitutionality may perpetuate, and will reverse the possible tendency of some courts toward an unduly narrow interpretation of Title VII, adopted for the purposes of avoiding perceived constitutional problems."[7]

VWoA agrees with the Solicitor General's views, quoted above, that an authoritative determination by this Court as to Section 701(j)'s constitutionality is warranted. The petition in this case should therefore be granted to resolve this important constitutional issue.

II. The Issue Of What Constitutes Undue Hardship Under Title VII's Reasonable Accommodation Provision Is An Important Question That Is Presently Pending Before The Court.

On January 21, 1986, this Court granted a petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit in *Ansonia Board of Education v.*

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[7] *Estate of Donald E. Thornton v. Caldor, Inc.*, No. 83-1158, Brief for the United States as Amicus Curie in Support of Granting Petition for a Writ of Certiorari, at pages 12-13.

Philbrook, Case No. 85-495. In *Philbrook,* the Second Circuit reversed a district court decision in favor of a school district employee who had been discharged for refusing to work on certain religious holydays because of his membership in the Worldwide Church of God. The precise question presented in *Philbrook* is whether an employer must implement an accommodation suggested by an employee if an alternative accommodation would satisfy the employee's religious needs without imposing more than a *de minimis* expense.

The grant of certiorari in the present case would complement the grant of certiorari in *Philbrook.* This case involves a large industrial plant which, at the time of Mrs. Protos' employment, employed in excess of 5,000 workers. The determination of whether VWoA could have, without undue hardship, acceded to Mrs. Protos' demand for a guarantee never to work Saturdays necessarily involves examination of the existence of available substitutes, the ability of such substitutes to perform an intricate assembly-line job without generating increased repairs, and the effect of excusing Mrs. Protos from Saturday work upon the discipline and morale of other workers, who desired to be excused from Saturday work for non-religious reasons. Thus, the present case presents the "undue hardship" issue in a factual context which, unlike that in *Philbrook,* is more typical of the context in which the issue has arisen in cases subsequent to this Court's decision in *Trans World Airlines v. Hardison,* 432 U.S. 63 (1977). *See, e.g., Brener v. Diagnostic Center Hospital,* 671 F.2d 141 (5th Cir. 1982); *Brown v. General Motors Corp.,* 601 F.2d 956 (8th Cir. 1979).

As discussed *infra* at pages 16-19, notwithstanding the *de minimis* standard enunciated by this Court in *Hardison,*

the various courts of appeals have reached divergent results in religious discrimination actions arising in circumstances involving large industrial employers. Consideration of the undue hardship issue in the context presented by this case would permit this Court to resolve these conflicts in a factual framework similar to that in which these important statutory issues historically have arisen.

Given the fact that *Philbrook* has been fully briefed in this Court and is scheduled to be argued on October 14, 1986, VWoA recognizes that there may exist practical problems with treating the present case as a companion to *Philbrook*. Therefore, alternatively VWoA respectfully requests that disposition of the present petition be deferred until after a decision in *Philbrook* is rendered. Depending upon the result and reasoning, disposition of *Philbrook* may obviate the need for plenary review of this case, at least as to the nonconstitutional issue presented herein.

III. The Petition Should Be Granted To Clarify The *Hardison* De Minimis Standard And To Resolve The Inconsistent Applications Of That Standard Which Have Arisen During The Past Nine Years.

In 1977, this Court ruled in *Trans World Airlines v. Haridson, supra,* that the reasonable accommodation provision of Title VII did not require an employer to implement accommodations for religious-based absences if such accommodations would cause more than a *de minimis* expense. Among those things which were viewed as constituting more than a *de minimis* expense were quality control or efficiency problems, *see* 432 U.S. at 84; morale problems of other employees caused by a perceived preferred status for religious absences, *see* 432 U.S. at 81-84;

and payment of overtime wages totalling only $50 per month for a three-month period, *see* 432 U.S. at 84, 92 n.6.

In the nine years that have passed since *Hardison*, various courts of appeals have rendered diametrically inconsistent decisions as to what evidence an employer must adduce to establish that a proposed accommodation results in more than *de minimis* expense. In its decision in the present case, for example, the Third Circuit expressly refused to follow the decision of the Fourth Circuit in *Jordan v. North Carolina Nat'l Bank*, 565 F.2d 72 (4th Cir. 1977), which held that absolute demands for every Saturday off—such as that requested by Mrs. Protos—were so broad and unlimited in scope that as a matter of law such demands could never be accommodated without the imposition of undue hardship.

In *Jordan*, an applicant for employment at a bank had demanded a guarantee from the employer never to be required to work on Saturday. The bank's response was to advise the prospective employee that it could not guarantee every Saturday off, but that it would try to accommodate her if possible. 565 F.2d at 76. In reversing the District Court's finding of discrimination, the Fourth Circuit, citing *Hardison*, ruled that the applicant's demand for a guarantee could not be reasonably accommodated by the bank at all and certainly not without "undue hardship." The court reasoned that such a demand for a guarantee could not possibly be met by an employer because of the inability of the employer to predict emergencies or other circumstances in which the employee's demand could not be accommodated:

> "Jordan's pre-requirement on its face was so unlimited and absolute in scope—*never* to work on Saturday—that it speaks its own unreasonableness and is

> thus beyond accommodation. This is nonetheless true even though she might have been willing to accept a part-time job, for emergencies are not inconceivable necessitating work on Saturday. Nor was she content simply to ask that in emergencies her religious preference be weighed and accorded, if possible. But the bank was unwilling to make a covenant that it could not perform and so create potential liability." 565 F.2d at 76.

Like the plaintiff in *Jordan,* Mrs. Protos demanded an absolute guarantee from VWoA and would settle for nothing less. She admitted that she had been advised by her supervisor that VWoA would try to give her some Saturdays off but that the production demands of Saturday overtime made it impossible to give her the absolute guarantee she demanded. The Third Circuit's decision, therefore, is directly contrary to that of the Fourth Circuit in *Jordan.* A writ of certiorari should be granted to resolve this conflict.

In addition to the conflict with the Fourth Circuit on the issue of whether, as a matter of law, a demand for an absolute guarantee for every Saturday off can be accommodated by an employer, the Court of Appeals decision is inconsistent with *Hardison* and with the decisions of other appellate courts to the extent that the Third Circuit did not give sufficient weight to the evidence of employee morale problems, or to the evidence of efficiency and production problems. Specifically, it was undisputed that there were numerous employees who wanted to take Saturdays off for secular reasons (such as hunting) and who complained when they were required to work while Mrs. Protos was excused. In *Hardison,* this Court specifically listed such

complaints as facts which would constitute undue hardship. 432 U.S. at 81-84. *See also Brener v. Diagnostic Center Hospital,* 671 F.2d 141, 146-147 (5th Cir. 1982).

Moreover, the reasonableness of VWoA's response to Mrs. Protos' demand—advising her that it would try to work with her but could not guarantee her every Saturday off—is supported by the undisputed fact that on three Saturdays the ARO pool was totally depleted. In circumstances in which the pool of available substitutes is sometimes depleted, requiring an assembly-line employer to excuse a worker from *all* Saturday work creates undue hardship by requiring use of a substitute who otherwise would be available to work in some other understaffed area of the plant. See *Hardison, supra,* 432 U.S. at 84 (rejecting accommodation under which employer could replace worker with supervisory personnel or personnel from other departments, noting this could impose cost "in the form of lost efficiency in other jobs").

In short, the decision of the Court of Appeals in the present case represents the latest in a series of divergent and inconsistent applications of the *de minimis* standard enunciated by this Court in *Hardison.* As one commentator has recently noted in the course of analyzing the various approaches to religious discrimination adjudication subsequent to *Hardison,* "far from resolving the lower courts' confusion as to the meaning of section 2000e(j)'s accommodation requirement, the Supreme Court's language in *Hardison* has been the foundation for highly divergent applications of the statute."[8]

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[8]Note, *Heaven Can Wait: Judicial Interpretation of Title VII's Religious Accommodation Requirement Since Trans World Airlines v. Hardison,* 53 Fordham L.Rev. 839, 848 (1985).

Accordingly, the Court should grant a writ of certiorari to clarify the meaning and scope of the *de minimis* standard initially enunciated in *Hardison,* and to resolve the conflicts in application of that standard which have evolved in the various courts of appeals.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 85-3591

ANGELINE S. PROTOS,
Appellee

v.

VOLKSWAGEN OF AMERICA, INC.,
Appellant

On Appeal from the United States District Court
for the Western District of Pennsylvania (Pittsburgh)
Civil No. 84-1251

Argued June 4, 1986
Before: ADAMS, WEIS, and HIGGINBOTHAM,
Circuit Judges

(Filed July 29, 1986)

JAMES P. HOLLIHAN (Argued)
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OPINION OF THE COURT

ADAMS, *Circuit Judge*

Under Title VII of the Civil Rights of 1964, employers are required to make reasonable accommodation for the religious practices of their employees. In this case, the district court ruled that Volkswagen of America, Inc. (Volkswagen) had violated the statute by refusing to accommodate the request of an assembly line employee to be excused from overtime work on Saturday, her Sabbath. This appeal requires us to consider whether the trial judge erred in determining that accommodation of the request would not cause the company undue hardship, and whether damages were correctly calculated. The company also challenges the constitutionality of the reasonable accommodation requirements. For the reasons that follow, we will affirm the court's decision in part but remand for a recalculation of damages.

I.

Angeline S. Protos is a member of the Worldwide Church of God. Under the tenets of that church, the Sabbath lasts from sunset Friday to sunset Saturday. Work is prohibited during this time, and failure to observe the Sabbath is cause for excommunication.

On May 9, 1979, Protos was hired by Volkswagen to work on the assembly line of its plant in New Stanton, Pennsylvania. She was assigned to the Trim Department as an assembler; her task was to connect four color-coded wires to four connectors, and to attach a ground screw. At first, this job did not conflict with her religious principles, since the assembly line on which she worked operated from Monday through Friday and the workday ended

before sunset. In August 1979, however, Volkswagen announced that in the upcoming months it would begin to schedule mandatory overtime work on a significant number of Saturdays.

Protos presented her supervisor with a note stating that as a member of the Worldwide Church of God she was unable to work on Saturdays. Her supervisor responded that while he did not believe she could be excused altogether from Saturday assignments, he would seek to devise some solution. Protos, however, made it clear that her religion prevented her from working on any Saturday. Subsequently, she provided her supervisor with a note from her minister explaining that in the Worldwide Church of God there were "no exceptions" to the prohibition of labor on the Sabbath.

Overtime work was scheduled for Protos' shift on September 22, October 6, and October 13, all Saturdays; Protos was absent on each of those days. The company took no immediate action, however, as the company's Industrial Relations Department considered the appropriate response. But following her failure to appear on the next scheduled Saturday, the Industrial Relations Department advised her supervisor that any future absences should be disciplined. When informed of this decision, Protos reiterated her position, and after her absence on December 8, the next scheduled Saturday, Volkswagen issued a formal written warning, the first step in the company's graduated disciplinary system.

Protos then filed a complaint with the Equal Employment Opportunity Commission (EEOC), alleging that the company's action contravened Title VII, 42 U.S.C. 2000e *et seq.* (1982). That action prompted Volkswagen to undertake further inquiry, which convinced the company of the

sincerity of Protos's religious beliefs. As a result, the company explored the possibility of assigning Protos to a new post where Saturday overtime was not required. But there was a waiting list of 200 people for transfer to the Facilities Maintenance Department, where such a position was available, and all those on the list had greater seniority. Protos's transfer could not be arranged without a waiver by the employees union, a local of the United Autoworkers of America (UAW), of the seniority provisions of the collective bargaining agreement. On February 1, 1980, Volkswagen requested a waiver, but the union refused.

Saturday overtime was subsequently scheduled on February 2, 23, and March 15. Protos did not appear for any of these days. The company invoked the escalating sanctions for unexcused absences provided for in its regulations, and, after suspending her twice, dismissed Protos on March 15, 1980.

On November 17, 1980, the EEOC issued a determination that there was reasonable cause to believe that Volkswagen had violated Title VII. On February 22, 1984, it issued a Notice of Right to Sue. Protos timely filed suit, and the case was tried, from July 16 to July 24, 1985, before a district judge sitting without a jury.

The principal issue before the district court was the degree of hardship that accommodating Protos's request for Saturdays off would have imposed on Volkswagen. Finding that "defendant suffered no economic loss" because of Protos's absence, and that the "efficiency, production, quality and morale" of her segment of the Trim Department and the entire assembly line remained intact without her, the district court ruled that Volkswagen could have accommodated her "without undue hardship and at

no cost." Thus, the company was held to have violated the statute.

Volkswagen had also contended that Title VII's religious accommodation requirement contravened the Establishment Clause of the First Amendment. Following several federal appellate court decisions, the court rejected that challenge. As relief, the court awarded Protos $73,911.36 in lost pay and benefits; it declined to deduct from that award unemployment benefits she had received during her time out of work. The court also ordered Protos reinstated effective June 1, 1980, although there was no work at the plant currently available. Volkswagen filed a timely appeal.

II.

A.

Section 703(a)(1) of the Civil Rights Act of 1964, Title VII, makes it an unlawful employment practice to "discharge . . . , or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1) (1982). Section 701(j) of the Act, added by Congress in a 1972 amendment, elaborated on this provision by defining religion:

> The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

42 U.S.C § 2000e(j). "The intent and effect of this definition was to make it an unlawful employment practice under § 703(a)(l) for an employer not to make reasonable accommodations, short of hardship, for the religious practices of his employees and prospective employees." *Trans World Airlines, Inc. v. Hardison,* 432 U.S. 63, 74 (1977).[1]

Hardison is the only case in which the Supreme Court has interpreted the extent of the employer's obligation under the statute. There, the employee, also a member of the Worldwide Church of God, worked in an airline maintenance department that operated twenty-four hours a day. A conflict between his religion's demands and his work schedule arose when he was transferred, at his own request, to a new position in the department where he lacked sufficient seniority to avoid Saturday assignments. The union would not agree to a change of assignments for him in violation of the seniority agreement. Hardison also proposed to work only four days a week, but the company refused to accept that proposal.

The Court held that the company did not violate Title VII by failing to excuse Hardison from working on Saturday. In its central holding, the Court ruled that the reasonable accommodation requirement did not compel an employer to abrogate a collective bargaining agreement in

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[1]The amendment was intended to clarify the scope of an EEOC guideline, 29 C.F.R. § 1605.1 (1968), which required employers to make reasonable accommodations "to the religious needs" of employees and prospective employees, short of undue hardship. As an example of a situation where undue hardship may exist, the guideline posited the case of an employee whose "needed work cannot be performed by another employee of substantially similar qualifications during the period of absence of the Sabbath observer," *id. (quoted* in *Hardison,* 432 U.S. at 72 n.7.

order to enable an employee to satisfy religious observances. 432 U.S. at 81, 83. As for allowing the employee to work only four days a week, suggested by Hardison as an alternative means of accommodation, the Court held that this would create an "undue hardship" for the company. "Hardison's job was essential, and on weekends he was the only available person on his shift to perform it." 432 U.S. at 68. To allow him to work only four days, the Court reasoned, the company would either have to fill his position on Saturdays with supervisors or qualified personnel from other departments, or with employees from his department paid at overtime wages. "Both of these alternatives would involve costs to TWA either in the form of lost efficiency in other jobs or higher wages. . . . " 432 U.S. at 84. Relying on the district court's finding that these solutions would have "'created an undue burden on the conduct of TWA's business' " 432 U.S. at 84 n.15, the Court concluded that the company did not have to incur such costs to accommodate Hardison. "To require TWA to bear more than a *de minimis* cost in order to give Hardison Saturdays off is an undue hardship." 432 U.S. at 84.

Since *Hardison*, several courts of appeals have set forth guidelines to use in evaluating a religious accommodation case: those guidelines are modeled after the shifting burdens of proof employed in race and gender discrimination suits under Title VII. A plaintiff must first establish a prima facie case, by showing: "(1) he or she has a bona fide religious belief that conflicts with an employment requirement; (2) he or she informed the employer of this belief; (3) he or she was disciplined for failure to comply with the conflicting employment requirement." *Turpen v. Missouri-Kansas-Texas Railroad Co.*, 736 F.2d 1022, 1026 (5th Cir. 1984). *See also Philbrook v. Ansonia Board of Education*,

757 F.2d 476, 481 (2d Cir. 1985), *cert. granted,* 106 S. Ct. 848 (1986); *Brown v. General Motors Corp.,* 601 F.2d 956, 959 (8th Cir. 1979); *Anderson v. General Dynamics Convair Aerospace Division,* 589 F.2d 397, 401 (9th Cir. 1978), *cert. denied,* 442 U.S. 921 (1979). Once a plaintiff establishes a prima facie case, the burden then shifts to the employer to produce evidence showing that it cannot reasonably accommodate the worker without incurring undue hardship.

B.

In the case at hand, the district judge followed these guidelines in considering the evidence. His determination that Protos established a prima facie case is not disputed on appeal. Volkswagen agrees that Protos's religious beliefs are sincere, and it is clear that her religion forbade her to work on Saturdays. It is also evident that she informed her employer of her beliefs and was disciplined for failure to work on Saturdays.

Thus, the primary issue is whether the district court erred in determining that the company would not have to incur even a "*de minimis* cost" to accommodate Protos.[2] Volkswagen first maintains that because Protos sought a guarantee of having Saturdays off, her request was by definition incapable of being reasonably accommodated. It relies on *Jordan v. North Carolina National Bank,* 565 F.2d 72 (4th Cir. 1977), which held that a demand for

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[2]In addition to her religious accommodation argument, Protos maintains that she prevailed in the district court on a disparate treatment claim "under traditional Title VII principles." This contention lacks merit. While it may be correct that Protos was the only employee at the plant discharged for refusing to work overtime on Saturday, there is no evidence that any other employee asked to be excused from all Saturday overtime.

every Saturday off "was so unlimited and absolute in scope—never to work on Saturday—that [it] speaks its own unreasonableness and is thus beyond accommodation." 565 F.2d at 76.

The *Jordan* analysis, however, has not been followed by other courts. *See, e.g., Brown v. General Motors Corp.*, 601 F.2d at 960-61 n.6. To interpret Title VII in this fashion would effectively remove from the statute's protection all employees who subscribe to religions with strict prohibitions against Sabbath labor. By its terms, however, § 703(j) encompasses within its scope "all aspects of religious observance and practice, as well as belief," and the EEOC guideline after which it was modeled specifically referred to observation of the Sabbath as an example of a protected observance, *see* 29 C.F.R. § 1605.1 (1968). Indeed, the *Hardison* court itself proceeded on the premise that a Sabbath observer was entitled to be accommodated by her employer, and that the only question was "the reach of that obligation" on the part of the employer. 432 U.S. at 66. Consequently, we agree with the district court's rejection of the argument that an employee's request for a guarantee of never working on the Sabbath does not invoke the employer's duty to accommodate.

As an alternative ground for overturning the district court's decision, Volkswagen challenges the determination that it would not incur undue hardship if it were to accommodate Protos. The company maintains that it more than exceeded the "*de minimis*" showing of cost set out in *Hardison.*

With other courts, we recognize that the determination "whether a particular accommodation works an undue hardship on either an employer or union must be made by considering 'the particular factual context of each

case.' " *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239, 1243 (9th Cir. 1981), (*quoting Anderson*, 589 F.2d at 400). "The *magnitude* as well as the *fact* of hardship must be determined by the examination of the facts of each case." *Tooley*, 648 F.2d at 1243.

Here, the question of hardship was vigorously disputed at trial. The evidence showed that Volkswagen regularly maintained, along with employees assigned to specific posts on the assembly line, a crew of roving absentee relief operators (ARO) to be deployed as substitutes for absent employees. Protos introduced witnesses who testified that her job was easily learned, and that the line operated as efficiently when an ARO served in her stead as when she performed the job. Volkswagen's witnesses, by contrast, testified that the line operated with diminished efficiency in Protos's absence.

The court resolved this conflict in favor of Protos, finding that "plaintiff's witnesses were more credible than the witnesses presented by the defendant," and that "the efficiency, production, quality and morale of trim 15 and the entire assembly line remained intact during her absence." While Volkswagen argues that plant-wide absenteeism was especially high on Saturdays, and that Protos's absence therefore was felt more than it would otherwise have been, evidence supporting this contention was presented to the district court, and rejected as unpersuasive. Moreover, unlike the accommodation proposed in *Hardison*, the employer here was not obliged to pay higher wages in order to fill Protos's vacancy. The district court articulated the correct legal standard, as set forth in *Hardison*. And although we are inclined to believe the hardship question was considerably closer than the district court did, we cannot say that its factual determinations, based

on its assessment of the witnesses' credibility and its familiarity with the evidence, are clearly erroneous. *See* Fed. R. Civ. P. 52(a).[3]

III.

Volkswagen also asks us to hold that the religious accommodation requirement of Title VII violates the Establishment Clause of the First Amendment. We find no constitutional infirmity, however.

The company's constitutional argument is straightforward: by requiring employers to accommodate employees' religious practices and observances, the statute confers a benefit on religion. While an employer must accommodate an employee who seeks a day off for religious reasons, it is argued, the employer need not accommodate a worker's desire to spend more time with his or her family.

Under the test set forth by the Supreme Court in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), a statute does not violate the Establishment Clause if it has a secular purpose, has a primary effect that neither advances nor inhibits religion, and does not cause excessive government entanglement with religion. Applying this test, four other

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[3]Volkswagen maintains that the determination whether accommodating Protos would create an undue hardship presents a mixed question of law and fact, and thus is subject to review on a plenary basis rather than according to the "clearly erroneous" standard of Rule 52(a). However, where, as here, the district court has articulated correctly the *de minimis* standard as set forth in *Hardison*, reviewing courts have evaluated the lower court's conclusion on undue hardship as a factual finding subject to Rule 52(a). *See, e.g., Turpen*, 736 F.2d at 1026-27; Brener v. Diagnostic Center Hospital, 671 F.2d at 1026-27; *Tooley*, 648 F.2d at 1243-44. Moreover, in this case, the trial court's conclusion depended heavily on its assessment of the witnesses' credibility, and deference to the trial court is most warranted where such credibility determinations are at issue.

courts of appeals have considered the constitutionality of § 701(j). All have upheld it. *See, e.g., McDaniel v. Essex International, Inc.*, 696 F.2d 34, 37 (6th Cir. 1982); *Tooley*, 648 F.2d at 1244-46; *Nottelson v. Smith Steel Workers D.A.L.U.*, 643 F.2d 445, 453-55 (7th Cir. 1981), *cert. denied*, 454 U.S. 1046 (1981); *Hardison v. Trans World Airlines, Inc.*, 527 F.2d 33, 43-44 (8th Cir. 1976), *rev'd on other grounds*, 432 U.S. 63 (1977). These courts have declared that the statute works to protect freedom of conscience and prevent discrimination against adherents of minority faiths. *See, e.g., Nottelson*, 643 F.2d at 454.

Volkswagen, however, relies on the more recent Supreme Court decision in *Thornton v. Caldor, Inc.*, 105 S. Ct. 2914 (1985), where the Court struck down a Connecticut statute guaranteeing employees the right not to work on their Sabbath. It held that the statute contravened the "effects" prong of the *Lemon* test.

Writing for a unanimous Court, Chief Justice Burger stressed the absolute nature of the preference accorded Sabbath observers by the Connecticut law. As he observed, the statute "commands that Sabbath religious concerns automatically control over all secular interests at the workplace," and "takes no account of the convenience or interests of the employer or those of other employees who do not observe a Sabbath." 105 S. Ct. at 2917. He went on specifically to note: "There is no exception when honoring the dictates of Sabbath observers would cause the employer substantial economic burdens or when the employer's compliance would require the imposition of significant burdens on other employees required to work in place of the Sabbath observers. Finally, the statute allows for no consideration as to whether the employer has made reasonable accommodation proposals." *Id.* Because it

decrees an "unyielding weighting in favor of Sabbath observers over all other interests," the statute goes beyond having an incidental or remote effect of advancing religion, and has a primary effect of advancing "a particular religious practice." *Id.*

In a concurrence, Justice O'Connor, joined by Justice Marshall, expressed the understanding that Title VII's accommodation requirement would pass muster under the effects prong of the *Lemon* test. "Since Title VII calls for reasonable rather than absolute accommodation and extends that requirement to all religious beliefs and practices rather than protecting only the Sabbath observance, I believe an objective observer would perceive it as an anti-discrimination law rather than an endorsement of religion or a particular religious practice." 105 S. Ct. at 2919.

Unlike the Connecticut statute, Title VII does not require absolute deference to the religious practices of the employee, allows for consideration of the hardship to other employees and to the company, and permits an evaluation of whether the employer has attempted to accommodate the employee. Volkswagen contends that as applied in this case, Title VII provided a primary benefit to religion because Protos sought an absolute guarantee of exemption from all Saturday labor. However, in determining whether she was entitled to such a guarantee, the court considered the impact accommodating her would have on "secular interests of the workplace," *Thornton,* 105 S. Ct. at 2917, and found that given the nature of Protos's assembly line position and Volkswagen's method of providing substitutes for absent employees, her absence would not significantly affect those interests. Any effect the statute has of

advancing religion, therefore, would appear to be incidental to its primary effect of promoting freedom of conscience and prohibiting discrimination in the workplace.

Nor do we believe it can be said that the statute lacks a secular purpose, or that it would lead to excessive government entanglement with religion. The accommodation requirement, is "plainly intended to relieve individuals of the burden of choosing between their jobs and their religious convictions, where such relief will not unduly burden others. This is . . . a secular purpose, part of our 'happy tradition' of avoiding unnecessary clashes with the dictates of conscience.' " *Nottelson,* 648 F.2d at 445, (*quoting United States v. McIntosh,* 283 U.S. 605, 634 (Hughes, C.J., dissenting)).

As for excessive entanglement of government and religion, the statute does not pose the danger of bringing about any interplay of the sort the Establishment Clause seeks to avoid. To be sure, Title VII does require the EEOC or the courts to evaluate a plaintiff's claimed entitlement to accommodation of her religious principles. But all the government must do is ascertain whether the employee's belief is religious and is sincerely held, just as the government does in ruling on conscientious objector applications. *See Nottelson,* 643 F.2d at 455. While courts may not inquire into the verity of a religious belief, "it is entirely appropriate, indeed necessary, for a court to engage in analysis of the sincerity of someone's religious beliefs in both the free exercise context, and the Title VII context." *Philbrook,* 757 F.2d at 481 (citations omitted). *See United States v. Ballard,* 322 U.S. 78, 86 (1944).

It is true, of course, that under the statute, Volkswagen must accommodate Protos's religious practices, but not, for example, the desire of one of her coworkers to spend a

particular day with his or her family. However, the Supreme Court has never held that the Establishment Clause forbids government from taking any action whatsoever that benefits religious interests. While it is axiomatic that the Establishment Clause has as a central purpose ensuring government neutrality in matters of religion, *see Everson v. Board of Education,* 330 U.S. 1, 15-16 (1947), " '[n]eutrality' in matters of religion is not inconsistent with 'benevolence' by way of exemptions from onerous duties, so long as an exemption is tailored broadly enough that it reflects valid secular purposes." *Gillette v. United States,* 401 U.S. 437, 454 (1971) (citation omitted) (sustaining constitutionality of conscientious objector exemption from military service).[4] Title VII's religious accommodation provision attempts to minimize the economic sacrifices imposed on individuals because of their spiritual principles. The Establishment Clause does not prohibit such an effort.

IV.

In awarding relief, the district court relied on the parties' stipulation that had Protos not been discharged in 1980 for refusing to work on Saturdays, she would nonetheless have been laid off on January 22, 1983 because of declining business. The court stated that she would have

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[4]The breadth of the "exemption" afforded by Title VII is underscored by the fact that in defining religion, the EEOC has used the same broad definition as the Selective Service employs for conscientious objector purposes. *See, e.g.,* CD 76-104 (1976), CCH Emp. Prac. ¶6500. In the Selective Service context, the Supreme Court has held that to qualify as religious, a belief need not be a traditional faith, or be based on a Supreme Being; a religious belief may be one that is "purely moral and ethical in source and content but that nevertheless imposes upon [its holder] a duty of conscience. . . ." Welsh v. United States, 398 U.S. 333, 340 (1970).

received $49,495.25 in wages through this date along with $13,525.11 in fringe benefits. Finding that Protos was unable to obtain alternative employment following her discharge, the court awarded her this entire sum.

In addition, according to the stipulation, Protos would have been temporarily laid off in various weeks because of short-term slowdowns during the period between 1980 and 1983. The court awarded her $6,355 as the equivalent of the amount of unemployment benefits she would have received during these temporary layoffs. In fact, while Protos was out of work, she did receive $8,379 in unemployment benefits. Following the rule of *Craig v. Y&Y Snacks, Inc.*, 721 F.2d 77 (3d Cir. 1985), the district court declined to deduct the $8,379 from her award. It further noted that if she had been laid off on January 22, 1983, rather than in 1980, she would have been eligible for unemployment benefits thereafter at a slightly higher rate than she actually was paid, because of her greater experience. The court therefore awarded her an additional $4,536, the difference between the benefits she received following her 1980 dismissal and those she would have received if laid off later.

Volkswagen contends that the court erred by awarding Protos amounts to compensate her for unemployment benefits she would have received for temporary layoffs between 1980 and 1983, and for the higher rate of unemployment benefits she would have received following January 22, 1983 if she had been laid off then rather than in 1980. These sums, it contends, are compensatory damages, which may not be awarded under Title VII. We agree.

Title VII expressly authorizes an award of backpay "or any other equitable relief as the court deems appropriate." 42 U.S.C. § 2000e-5(g). This Court has held that

punitive damages are not available under this provision. *See, e.g., Richerson v. Jones,* 551 F.2d 918, 926-28 (3d Cir. 1977). The overwhelming weight of authority from other courts is that compensatory damages are not available under Title VII either. *See, e.g., Walker v. Ford Motor Co.,* 684 F.2d 1355, 1363 (11th Cir. 1982); *Padway v. Palches,* 665 F.2d 965, 968 (9th Cir. 1982); *Farmer v. ARA Services, Inc.,* 660 F.2d 1096, 1107 (6th Cir. 1981). *See also Scott v. University of Delaware,* 601 F.2d 76, 81 n.8 (3d Cir. 1979) ("Compensatory and punitive damages are generally not recoverable under Title VII.")

In *Richerson,* this Court identified three rationales supporting its decision that punitive damages are not available under Title VII, and those reasons are equally applicable to compensatory damages. One stems from the language of the statute's remedies provision, which allows for reinstatement "with or without back pay" or other equitable remedies. 42 U.S.C. § 2000e-5(g). Like punitive damages, compensatory damages are viewed as a legal, not an equitable remedy and thus would appear not to be authorized by the statute. *See Walker,* 684 F.2d at 1364.

Second, courts have noted that § 2000e-5(g) appears to have been modeled on 29 U.S.C. § 160(c) (1982), the provision of the National Labor Relations Act that authorizes remedies against employers for unfair labor practices, *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 419 n.11 (1975), and that that statute has been interpreted not to allow compensatory or punitive damage awards. *See Harrington v. Vandalia-Butler Board of Education,* 585 F.2d 192, 194-196 (6th Cir. 1978), *cert. denied,* 441 U.S. 932 (1979); *Richerson,* 551 F.2d at 927. Thus, the "close relationship between 42 U.S.C. § 2000e-5(g) and 29 U.S.C. § 160(c)," *id.,* bolsters the conclusion that Congress did not

intend to authorize the award of compensatory damages under Title VII.

Finally, as we also noted in *Richerson*, when Congress in 1968 enacted Title VIII, the Fair Housing laws, 42 U.S.C. § 3612, *et seq.* (1982), it specifically provided for both actual and punitive damage remedies. Yet four years later, when Congress amended Title VII to include the remedies provision of § 2000e-5(g), it did not include any damage remedy; it authorized only back pay and equitable relief. This "contrast between Title VII's equitable remedies and Title VII's legal remedies," 551 F.2d at 928, further suggests that "'Congress intentionally left out any provision for either general or punitive damages.'" *Walker*, 684 F.2d at 1364, (quoting *Padway*, 665 F.2d at 968).[5] Accordingly, we conclude that compensatory as well as punitive damages are not available under Title VII.

It is clear that the prohibition on compensatory damages would bar claims for emotional distress, pain and suffering, or interest that would have been earned on the lost wages. The compensatory damages ban, however, "does not include concomitants of employment such as fringe benefits, pension benefits, or other lost work benefits. . . ." *Walker*, 684 F.2d at 1364, which come within the equitable restitution authorized by the statute. We believe that unemployment benefits are more fairly characterized as compensatory damages rather than "concomitants" of employment. Quite simply, unemployment benefits are a concomitant not of working, but of not working. They are

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[5]Courts have sometimes used the term "compensatory damages" to refer to awards of back pay or lost benefits. *See, e.g.*, Rosen v. Public Service Electric and Gas Co., 477 F.2d 90, 96 (3d Cir. 1973). Subsequently, in *Richerson* we made clear that the recovery of lost pension benefits allowed in *Rosen* is, like an award of back pay itself, "actually a form of equitable restitution."

not payments that an employer makes to employees pursuant to an employment relationship, but rather are made "by the state out of state funds derived from taxation." *NLRB v. Gullett Gin Co.*, 340 U.S. 361, 364 (1951). Although the taxes are paid by employers, the payments do not discharge an employer's obligation to his employees, but carry out a governmental "policy of social betterment for the benefit of the entire state." *Id.*

The conclusion that lost unemployment benefits are compensatory damages not available to a plaintiff under Title VII is bolstered by the decision in *Craig*. That case presented a different question, also involving unemployment benefits and Title VII recoveries, than the one we face here: whether a defendant may deduct from a Title VII back pay award the value of unemployment benefits received by a plaintiff following her unlwful discharge. Even though such benefits supplied payment to an employee covering the same period for which the back pay award was intended to make her financially whole, we held that a defendant could not deduct the benefits from the amount paid to the plaintiff.

Our holding followed from the premise that "[u]nemployment compensation most clearly resembles a collateral benefit which ordinarily is not deducted from a plaintiff's recovery." 721 F.2d at 83. Again analogizing to the back pay provision of the National Labor Relations Act, Judge Sloviter noted that in *Gullett Gin*, the Supreme Court upheld the NLRB's refusal to deduct unemployment benefits from backpay awards under § 160(c). *Gullett Gin* also characterized unemployment benefits as "collateral," and reasoned that "[s]ince no consideration has been given or should be given to collateral *losses* in framing an order to reimburse employees for their lost earnings, manifestly

no consideration need be given to collateral benefits which employees may have received." 340 U.S. at 364.

In *Craig*, then, this Court declined to deduct unemployment benefits *received* from a back pay award in part based on the premise that when *lost* as a result of discharge, such collateral benefits would not be included as relief. To hold now that lost unemployment benefits are recoverable would produce an inconsistent result and grant plaintiffs a windfall not authorized by § 2000e-5(g).[6] Accordingly, we hold that unemployment benefits *lost* as a result of being wrongfully discharged are compensatory damages that may not be included in a back pay award under Title VII. It follows that the district court erred when it awarded Protos $6,355 in unemployment benefits she would have received during temporary layoffs, and $4,536 as the difference between the rate of unemployment benefits that she actually received and that she would have been paid at if laid off on January 22, 1983.

V.

To summarize, we hold that the district court did not err in ruling that Volkswagen could have accommodated

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[6]This case illustrates the potential for duplicative awards if lost unemployment benefits are deemed recoverable under Title VII. Consider that part of the award Protos received was to compensate her for the unemployment benefits she would have received during temporary layoffs between 1980 and 1983. Even absent the Title VII violation, Protos would have been on layoff during these periods, and would have received only unemployment benefits. In fact, she did receive unemployment benefits during these periods. Thus, allowing her to recover the amount of these unemployment benefits in damages would constitute a duplicative recovery, and also result in the employer being required to pay an amount it would not have owed had the plaintiff continued as a Volkswagen employee.

Protos without "undue hardship," and that Title VII's religious accommodation requirement does not violate the Establishment Clause. The district court erred, however, in including in Protos's backpay award compensation for unemployment benefits she would have received had she not been discharged in 1980 for refusing to work on Saturdays. The judgment of the district court will be affirmed in part and vacated in part, and remanded for further proceedings consistent with this opinion.

A True Copy:

Teste:

Clerk of the United Stated Court of Appeals
for the Third Circuit

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ANGELINE S. PROTOS,

Plaintiff,

vs.

VOLKSWAGEN OF AMERICA, INC.,

Defendant.

Civil Action 84-1251

FINDINGS OF FACT AND CONCLUSIONS OF LAW

ZIEGLER, District Judge

I. Findings of Fact

(1) Plaintiff, Angeline S. Protos, filed a civil action for money damages and injunctive relief against defendant, Volkswagen of America, Inc., based on Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*

(2) Plaintiff contends that she was disciplined, suspended and ultimately terminated by defendant due to her religious beliefs in violation of the 1972 amendment to Title VII, 42 U.S.C. § 2000e(j).

(3) Jurisdiction is based on 42 U.S.C. § 2000e-5(f)(3) and 28 U.S.C. § 1343(a).

(4) Plaintiff has satisfied all administrative prerequisites to the filing of this action, including the filing of written charges with the Equal Employment Opportunity Commission; an investigation by the agency; a finding of probable cause to believe that defendant violated Title VII

by failing to accommodate plaintiff's religious beliefs; notice of the right to sue; and a timely complaint.

(5) Angeline Protos was hired by Volkswagen as an assembler at the New Stanton assembly plant on May 9, 1979.

(6) At all relevant times, plaintiff was a member of the Worldwide Church of God. One of the tenets of the church provides that a member shall not work on the Sabbath which extends from sunset on Friday to sunset on Saturday.

(7) The evidence preponderates that plaintiff's religious beliefs were sincerely held and consistent with the teachings of the Worldwide Church of God. Plaintiff documented her religious beliefs by providing letters to defendant from her minister on two occasions.

(8) The evidence preponderates that plaintiff was a competent, efficient, loyal and highly motivated employee of defendant until she was discharged on March 17, 1980.

(9) Plaintiff worked on the assembly line in trim 15, and performed the task of attaching four color coded wires of varying lengths to three connectors and a ground screw in the tail light assemblies of Rabbit automobiles. The evidence preponderates that the job could be learned in 15 minutes and performed in 30 seconds. We find that plaintiff has established by a preponderance of the evidence that the assignment was the least difficult and strenuous in trim 15.

(10) From the date of her employment, until August of 1979, plaintiff's regular work shift was from 6:30 a.m. to 3:00 p.m., Monday to Friday, and no conflict arose with her religious beliefs or observances. Plaintiff performed her

work in a competent manner from Monday to Friday of each work week.

(11) In September, 1979, Volkswagen began to schedule mandatory overtime on Saturday which would require plaintiff to work in violation of her Sabbatarian beliefs. Plaintiff informed defendant that she would be unable to work on Saturdays due to the Sabbath.

(12) On September 29 and October 6 and 13, 1979, plaintiff was excused by her supervisor from work on Saturday due to her religious beliefs.

(13) On November 9, 1979, defendant advised plaintiff that she no longer would be excused from work on Saturdays. Plaintiff informed defendant that she would be unable to work on Saturday due to her religious beliefs and the teachings of the Worldwide Church of God.

(14) On December 10, 1979, defendant initiated disciplinary proceedings against plaintiff, pursuant to step 1 of the collective bargaining agreement, for failing to work on Saturday, December 8, 1979.

(15) On February 4, 1980, plaintiff was disciplined for failing to work on Saturday, February 2, 1980, and a one-week disciplinary layoff was imposed.

(16) On February 25, 1980, plaintiff was disciplined for failing to work on Saturday, February 23, 1980, and a two-week disciplinary layoff was imposed.

(17) On March 17, 1980, plaintiff was discharged for failing to work on Saturday, March 15, 1980.

(18) Plaintiff gave reasonable notice to Volkswagen prior to each absence, and plaintiff was willing to work on

Sunday or make any adjustment in her work schedule to avoid the directive that she work on Saturday.

(19) The evidence preponderates that the absence of plaintiff from work on Saturday, and specifically on December 8, 1979, February 2 and 23, and March 1, 1980, caused no undue hardship to Volkswagen. The credible evidence establishes that defendant had available, at the same rate of pay, qualified employees who were able and did perform the assignment of plaintiff during her absence, without undue hardship or de minimus cost to defendant.

(20) The evidence preponderates that defendant had available, and utilized absentee relief operators and tag relief employees to replace plaintiff without affecting the efficiency, quality or production of trim 15 and the assembly line.

(21) Our finding that plaintiff sustained her burden of proving that Volkswagen discriminated due to her religious beliefs is based on the impressive array of credible witnesses presented by plaintiff. For example, Kenneth Holler testified that production continued without interruption on the days that plaintiff was absent with the use of one of the two absentee relief operators who were assigned to trim 15. In addition, each segment of the assembly line utilized the "A.R.O.'s" from other segments of the line to cover the jobs of the various employees who were absent. In sum, the A.R.O.s were employed by defendant as substitutes for absent employees and the evidence preponderates that defendant was able to cover the absence of plaintiff on each of the relevant days without an undue hardship, indeed without any hardship whatsoever.

(22) Frank Pearsol was a particularly credible witness. He testified without any apparent bias to either party and

impressed the court as an intelligent, articulate and loyal employee. Pearsol related that plaintiff performed the simplest job on the assembly line and the one to which the new employees were assigned. Hence, defendant was able to replace plaintiff on each Saturday without any hardship. Normal production continued and quality control was maintained, even when the assembly line operated at an accelerated pace.

(23) Volkswagen presented witnesses to meet its burden of production of evidence. *See Bellissimo v. Westinghouse Elec. Corp.*, 764 F.2d 175 (3d Cir. 1985). However, we find that plaintiff has satisfied her burden of proof by the fair weight of the credible evidence. Defendant's evidence that the efficiency, production, quality and morale of trim 15 and the assembly line were undermined due to plaintiff's absence on selected Saturdays was not persuasive. First, we find that plaintiff's witnesses were more credible than the witnesses presented by defendant. Second, the exhibits of record undermine the testimony of defendant's witnesses. For example, contrary to the testimony of Daniel Antis, the area coordinator of trim 15, the documentary evidence fails to relate the problems of trim 15 to the absence of plaintiff. *See* Plaintiff's Ex. 12. Third, while defendant presented evidence of problems of unexcused absenteeism, we find that plaintiff's evidence preponderates that the end product was not affected by the absence of plaintiff because defendant was able, and did replace plaintiff with competent substitutes, without difficulty throughout the manufacturing process.

(24) Defendant's evidence that one employee complained because plaintiff was absent on one Saturday due to her religious beliefs fails to preponderate. There is no credible evidence that the complaint affected the routine

operation of the assembly line or caused a hardship, de minimus or otherwise, to defendant.

(25) Plaintiff's evidence preponderates that defendant was able to utilize other absentee relief operators and tag relief operators on the assembly line to replace the A.R.O.'s in trim 15, on the days on which an absentee relief operator was assigned to plaintiff's job, without undue hardship, and without any cost to defendant.

(26) The evidence preponderates that defendant was able to conduct an efficient and routine assembly line operation on the days on which plaintiff was absent due to her religious beliefs, despite the unexplained absences of other employees.

(27) The evidence preponderates that defendant was able and did train substitute employees to perform the job of plaintiff without additional time, expense or undue hardship.

(28) The evidence preponderates that defendant was able and did procure qualified substitute employees to perform the job of plaintiff without violation or deviation from the collective bargaining agreement between defendant and the United Auto Workers of America.

(29) The evidence preponderates that the excused absence of plaintiff from overtime work on Saturday would not violate any provision of the collective bargaining agreement between defendant and Local 2055 of the United Auto Workers. *See* Paragraphs 139-141 of Defendant's Ex. A at 50-51.

(30) The evidence preponderates that Angeline Protos was the only employee from a work force of 5,000 who was

disciplined, suspended and terminated for refusing to work overtime on Saturdays due to her religious beliefs.

(31) The evidence preponderates that plaintiff was subject to disparate treatment, i.e., discrimination, because she was discharged from a job for which she was qualified while others not in the protected class were retained.

(32) The evidence preponderates that defendant refused to excuse plaintiff from overtime assignments on the relevant Saturdays despite the fact that employees not in the protected class were granted excused absences from overtime assignments by management pursuant to paragraphs 140-141 of the collective bargaining agreement.

(33) The evidence preponderates that the nondiscriminatory reasons offered by defendant were pretextual because excused absences were granted to nonprotected employees from overtime assignments for various reasons pursuant to paragraphs 140-141 of the bargaining agreement and for jury duty, sickness, vacation, bereavement, education, public office, and others. *See* Stipulation at ¶3.

(34) The evidence preponderates that plaintiff would not have been disciplined, suspended or discharged but for her sincerely held religious beliefs.

II. Conclusions of Law

(35) In 1972, Congress amended the Civil Rights Act of 1964 to require that an employer must reasonably accommodate the religious observances of an employee except when "undue hardship on the conduct of the employer's business" will result. 42 U.S.C. § 2000e(j) (1982).

(36) The reasonable accommodation language of the statute was taken from the guidelines of the Equal Employment Opportunity Commission then in effect, 29 C.F.R. § 1605.1(b) (1968), and the statements of Senator Jennings Randolph are cited by plaintiff as useful:

> MR. RANDOLPH. Mr. President, freedom from religious discrimination has been considered by most Americans from the days of the Founding Fathers as one of the fundamental rights of the people of the United States. Yet our courts have on occasion determined that this freedom is nebulous, at least in some ways. So in presenting this proposal to S. 2515, it is my desire and I hope the desire of my colleagues, to assure that freedom from religious discrimination in the employment of workers is for all time guaranteed by law.
>
> I am sure that my colleagues are well aware that there are several religious bodies—we could call them religious sects; denominational in nature—not large in membership, but with certain strong convictions, that believe there should be a steadfast observance of the Sabbath and require that the observance of the day of worship, the day of the Sabbath, be other than on Sunday. On this day of worship work is prohibited whether the day would fall on Friday, or Saturday, or Sunday. There are approximately 750,000 men and women who are Orthodox Jews in the U.S. work force who fall in this category of persons I am discussing. There are an additional 425,000 men and women in the work force who are Seventh-Day Adventists.
>
> * * *
>
> I say to the distinguished chairman of the Labor and Public Welfare Committee, who manages this bill, that there has been a partial refusal at times on the

part of employers to hire or to continue in employment employees whose religious practices rigidly require them to abstain from work in the nature of hire on particular days. So there has been, because of understandable pressures, such as commitments of a family nature and otherwise, a dwindling of the membership of some of the religious organizations because of the situation to which I have just directed attention.

* * *

The term "religion" as used in the Civil Rights Act of 1964 encompasses, as I understand it, the same concepts as are included in the first amendment—not merely belief, but also conduct; the freedom to believe, and also the freedom to act.

I think in the Civil Rights Act we thus intended to protect the same rights in private employment as the Constitution protects in Federal, State, or local governments. Unfortunately, the courts have, in a sense, come down on both sides of this issue. The Supreme Court of the United States, in a case involving the observance of the Sabbath and job discrimination, divided evenly on this question.

This amendment is intended, in good purpose, to resolve by legislation—and in a way I think was originally intended by the Civil Rights Act—that which the courts apparently have not resolved. I think it is needed not only because court decisions have clouded the matter with some uncertainty; I think this is an appropriate time for the Senate, and hopefully the Congress of the United States, to go back, as it were, to what the Founding Fathers intended. The complexity of our industrial life, the transition of our whole area of employment, of course are matters that were not always understood by those who led our Nation in earlier days.

118 Cong. Rec. 705-06 (1972). According to plaintiff, the amendment is a rather clear expression Congress intended that employers accommodate the religious beliefs, observances and obligations of members of religious faiths which may differ from the mainstream of religious practices in this nation. The Supreme Court, however, is less enamored with the legislative history. *Trans World Airlines, Inc. v. Hardison,* 432 U.S. 63, 74-75 & n. 9 (1977).

(37) In *Trans World Airlines, Inc. v. Hardison,* the Supreme Court construed the 1972 Amendment to require an employer to accommodate the religious observances of employees unless such accommodation would contravene the provisions of a collective bargaining agreement or would cause the employer undue hardship. The only act of accommodation in this case is the excused absence of Angeline Protos from overtime work on Saturday during daylight hours. As in *Brown v. General Motors Corp.,* 601 F.2d 956, 958 (8th Cir. 1979), such an arrangement would not contravene a valid collective bargaining agreement.

(38) Several courts of appeals have discussed the burden of proof in a Title VII religious discrimination case as follows:

> A plaintiff in a case makes out a prima facie case of religious discrimination by proving: (1) he or she has a bona fide religious belief that conflicts with an employment requirement; (2) he or she informed the employer of this belief; (3) he or she was disciplined for failure to comply with the conflicting employment requirement.

Philbrook v. Ansonia Bd. of Educ., 757 F.2d 476, 481 (2d Cir. 1985); *Turpen v. Missouri-Kansas-Texas R.R. Co.,* 736 F.2d 1022, 1026 (5th Cir. 1984); *Brown v. General Motors Corp.,* 601 F.2d 956, 959 (8th Cir. 1979); *Anderson v. Gen.*

Dynamics, 589 F.2d 397, 401 (9th Cir. 1978). Although the Court of Appeals for the Third Circuit has not adopted the test as yet, we are confident that the rule represents an accurate statement of law.

(39) As rehearsed, Angeline Protos satisfied the burden of proving a prima facie case of religious discrimination by a preponderance of the evidence. She presented credible evidence that she has a sincerely held religious belief which conflicts with Volkswagen's requirement that an employee must perform overtime work on Saturday, during day light hours, unless excused by the Company. Although defendant attempted to show that plaintiff's belief is insincere, there is no credible evidence to support that view. The sincere and bona fide religious beliefs and observances of plaintiff cannot be challenged on this record. Plaintiff has met the test for religious sincerity set forth in *Lewis v. Califano,* 616 F.2d 73,77-81 (3d Cir. 1980).

(40) Plaintiff also has met the remaining prima facie requirements. She presented credible evidence that Volkswagen was informed of her beliefs prior to any absence from work or discipline by defendant. Further, it is not disputed that plaintiff would not have been disciplined, suspended or discharged but for her refusal to work overtime on the relevant Saturdays, and we have found that the absences were due to her religious beliefs. No other employee was treated similarly. Indeed, many employees were excused from overtime work for a variety of secular reasons.

(41) Volkswagen contends that, because Angeline Protos demanded a "guarantee" that she would be excused from all work on Saturdays following the overtime

announcement of September 1979, plaintiff failed to present a prima facie case as a matter of law, citing *Jordan v. N. Carolina Natl. Bank,* 565 F.2d 72 (4th Cir. 1977). We disagree. First, in our judgment, the panel's opinion in *Jordan* misconstrues *Hardison* because, assuming an employee demands a guarantee of immunity from work on the Sabbath, an employer is required to reasonably accommodate the observance if it can be done without undue hardship, as here. Second, we believe that Judge Winter presented the better analysis in the dissent. And third, the subsequent decision of the Court of Appeals in *Brown v. General Motors Corp.,* 601 F.2d 956 (8th Cir. 1979) is more in keeping with our view of the teachings of the Supreme Court.

(42) Volkswagen produced evidence to attempt to dispel the adverse inference created by the prima facie case of plaintiff to the effect that to accommodate plaintiff's religious beliefs would constitute an undue hardship. Defendant's witnesses testified that to excuse Angeline Protos from Saturday overtime would lead to inefficiency, lost production, poor quality and loss of morale.

(43) We have previously found that defendant's evidence was hotly contested and that plaintiff met her burden of proof by the weight of the credible evidence. We hold that plaintiff went forward with credible evidence which established that the nondiscriminatory reasons advanced by defendant were pretextual. *See Bellissimo v. Westinghouse Electric Corp.,* 764 F.2d 175 (3d Cir. 1985).

(44) Plaintiff's evidence establishes that defendant suffered no economic loss when she refused to work overtime on Saturday. Angeline Protos was not compensated for the absence, and plaintiff was replaced by an employee, who was paid at the same rate of pay. Further, as rehearsed,

plaintiff presented the more believable evidence that the efficiency, production, quality and morale of trim 15, and the entire assembly line remained intact during her absence. Plaintiff also established by convincing evidence that she was subjected to disparate treatment and that no employee in the non-protected class was similarly treated. We hold that plaintiff has satisfied her ulitmate burden of persuasion. *Dillon v. Coles,* 746 F.2d 998 (3d Cir. 1984).

(45) Volkswagen's final contention appears to be that relief is inappropriate because the 1972 Amendment to Title VII is unconstitutional. We agree with defendant that the foregoing findings require resolution of the establishment clause question. *See Gavin v. Peoples Natural Gas,* 613 F.2d 482 (3d Cir. 1980). However, learned minds have addressed the question and no appellate court has held that the act constitutes an establishment of religion in violation of the First Amendment. *See, e.g., Philbrook v. Ansonia Bd. of Education,* 757 F.2d 476, 487 n.11 (2d Cir. 1985); Note, *Religious Accommodation,* 53 Fordham L.Rev. 839, 854-855 (1985). We perceive no reason to deviate from those wise teachings. *See also Estate of Thornton V. Caldon,* U.S. , 53 U.S.L.W. 4853, 4856 (1985) (O'Connor, J., *concurring*).

(46) We have found that plaintiff has established by a preponderance of the evidence that defendant failed to reasonably accommodate the religious beliefs of plaintiff and further that defendant could have done so without undue hardship and at no cost. The credible evidence establishes that but for the illegal conduct of defendant, plaintiff would not have been discharged, and that the discharge was due to protected activity. We turn to the appropriate relief.

(47) The parties have stipulated that, if Angeline Protos had worked for the defendant from March 17, 1980 to January 22, 1983, when she would have been laid off due to a reduction in defendant's business, she would have earned the sum of $49,495.25. Since we have found that defendant discriminated against plaintiff, we will award this sum as back pay because the evidence preponderates that plaintiff was unable to find alternative employment despite good faith efforts subsequent to her discharge.

(48) The parties have stipulated that, if Angeline Protos had worked for defendant from March 17, 1980 to January 22, 1983, she would have earned fringe benefits in the sum of $13,525.11 plus unemployment benefits during a production slowdown in the sum of $6,355. Since we have premised liability and causation on defendant, we will award this sum to plaintiff because the evidence preponderates that plaintiff was unable to find alternative employment despite good faith efforts subsequent to her discharge.

(49) We will award to plaintiff the sum of $4,536 which represents the difference in the rate of unemployment compensation benefits which plaintiff received and that which she would have received if laid off on January 22, 1983 for economic reasons.

(50) Unemployment compensation benefits are not deductible from an award of back pay against a private employer in Title VII action in this jurisdiction, *Craig v. Y&Y Snacks, Inc.*, 721 F.2d 77 (3d Cir. 1983), and there is no equitable reason to do so in this case. *See generally Dillon v. Coles*, 746 F.2d 998 (3d Cir. 1984).

(51) The evidence preponderates, and the parties have stipulated that plaintiff would have been laid off effective

January 22, 1983. While this interdicts the claim for back pay, plaintiff is entitled to be reinstated effective March 17, 1980, with full seniority rights retroactive to that date. 42 U.S.C. § 2000e-5(g) (1982). Reinstatement is required under the facts of this case, although work is not available at this time. There is no likelihood of disharmony when plaintiff is returned to the work place.

(52) Judgment will be entered on behalf of plaintiff, Angeline S. Protos, and against defendant, Volkswagen of America, Inc., in the sum of $73,911.36. Reinstatement will also be ordered effective March 17, 1980, in a judgment order to be filed with the Clerk of Court. Counsel for plaintiff will be ordered to file a motion for counsel fees, with a supporting affidavit, within 10 days.

Dated: August 27, 1985 ..../s/ DONALD E. ZIEGLER....
Donald E. Ziegler
United States District Judge

cc: James W. Carroll, Jr., Esq.
1330 Grant Building
Pittsburgh, PA 15219

James P. Hollihan, Esq.
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Pittsburgh, PA 15219

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ANGELINE S. PROTOS,

Plaintiff,

vs.

VOLKSWAGEN OF AMERICA, INC.,

Defendant.

Civil Action 84-1251

ORDER OF COURT

AND NOW, this 27th day of August, 1985, in accordance with the findings of fact and conclusions of law of record,

IT IS ORDERED that judgment be and hereby is entered on behalf of plaintiff, Angeline S. Protos, and against defendant, Volkswagen of America, Inc., in the sum of $73,911.36.

IT IS FURTHER ORDERED that plaintiff shall be and hereby is reinstated to her former position with defendant, with full seniority rights, effective March 17, 1980.

IT IS FURTHER ORDERED that counsel for plaintiff shall file a motion for counsel fees, with a supporting affidavit, within 10 days.

/s/ DONALD E. ZIEGLER
Donald E. Ziegler
United States District Judge

cc: James W. Carroll, Jr., Esq.
James P. Hollihan, Esq.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ANGELINE S. PROTOS,

Plaintiff,

vs.

VOLKSWAGEN OF AMERICA, INC.,

Defendant.

Civil Action 84-1251

MEMORANDUM OPINION

Ziegler, District Judge

Pending before the court is the motion to amend or reconsider the findings of fact and judgment. Defendant contends that we should amend finding 47 and reduce the back pay award by $2,554 because plaintiff would have been absent "on the average of 4 hours of work each week" due to her sabbatical observances on Friday evenings. Defendant overlooks, however, that the award of back pay was based on the written stipulation of the parties concerning the precise wage loss sustained by plaintiff from March 17, 1980 through January 22, 1983. Stipulation at ¶ 1 & 2. We must assume that Volkswagen calculated the wage loss before making this judicial admission. Moreover, it would be unfair and prejudicial to plaintiff to amend the finding after the entry of judgment because plaintiff may have relied on the stipulation and abstained from presenting evidence to rebut the testimony of Ken Holler and Richard Trio. Defendant never moved to amend the stipulation during trial and therefore plaintiff was never apprised that she would be required to present evidence on the question

of the accuracy of the stipulated wage loss. Under these circumstances, we decline to look beyond the stipulation of the parties.

Defendant's final contention is plainly without merit. We are bound to apply the teachings of the Court of Appeals in *Craig v. Y. & Y. Snacks, Inc.*, 721 F.2d 77 (3d Cir. 1985) until the rule is reversed by the appellate court or the Supreme Court. Our findings applied the rule of non-deductibility of unemployment compensation benefits in a Title VII action against a private employer and defendant's relief, if any, rests with a higher authority.

Defendant's "motion to amend or to reconsider findings and judgment" will be denied in a written order to follow.

Dated: September 12, 1985 /s/ DONALD E. ZIEGLER
Donald E. Ziegler
United States District Judge

cc: James W. Carroll, Jr., Esq.
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IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ANGELINE S. PROTOS,

Plaintiff,

vs.

VOLKSWAGEN OF AMERICA, INC.,

Defendant.

Civil Action 84-1251

ORDER OF COURT

AND NOW, this 12th day of September, 1985,

IT IS ORDERED that the motion of defendant to amend or to reconsider the findings and judgment be and hereby is denied.

/s/ DONALD E. ZIEGLER
Donald E. Ziegler
United States District Judge

cc: Counsel of record

Supreme Court, U.S.
FILED
OCT 25 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-496

In the Supreme Court of the United States

October Term, 1986

VOLKSWAGEN OF AMERICA, INC.,
Petitioner,

v.

ANGELINE S. PROTOS,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Brief In Opposition To Petition For Writ Of Certiorari

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

1. Whether Section 701(j) Of The Civil Rights Act Of 1964 Constitutes An Establishment Of Religion In Violation Of The First Amendment?

2. Whether There Was Sufficient Evidence For The District Court To Determine That, As A Matter Of Fact, Petitioner/Employer ("Volkswagen") Could Accommodate Respondent/Employee's ("Mrs. Protos") Sincerely Held Religious Beliefs Without Undue Hardship?

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No. 86-496

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1986

VOLKSWAGEN OF AMERICA, INC.,
Petitioner,

v.

ANGELINE S. PROTOS,
Respondent.

On Petition For Writ Of Certiorari To
The United States Court Of Appeals
For The Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Angeline S. Protos, submits this Brief In Opposition To The Petition For Writ of Certiorari filed by Petitioner Volkswagen of America, Inc., Appellant below, in the action captioned, Angeline S. Protos v. Volkswagen of America, Inc., No. 85-3591. The Opinion of the United States Court of Appeals for the Third Circuit is published at 797 F.2d 129 (3d Cir. 1986).

COUNTERSTATEMENT OF THE CASE

Angeline S. Protos was hired by Volkswagen as an assembler at the New Stanton, Pennsylvania assembly plant on May 9, 1979. At all times relevant hereto, Mrs. Protos was a member of the Worldwide Church of God.

One of the tenets of the Worldwide Church of God is that its members shall not work on the Sabbath which extends from sunset on Friday to sunset on Saturday. Mrs. Protos' religious beliefs were sincerely held and she was an active and respected member of her congregation. The penalty for a member of the Worldwide Church of God who does not observe the Sabbath requirement is excommunication.

Prior to September of 1979, Mrs. Protos was able to work her scheduled shift without any difficulty since her workday ended on Friday prior to the Sabbath. At all times,

Mrs. Protos was universally considered an extremely competent, loyal and highly motivated employee.

In September, 1979, Volkswagen began scheduling mandatory overtime on Saturday which would require Mrs. Protos to work on Saturday in violation of her religious beliefs. Mrs. Protos immediately presented her supervisor with written documentation of her religious beliefs and informed her supervisor that she would not be able to work on Saturday.

On September 29, October 6 and October 13, 1979, Volkswagen scheduled mandatory overtime for its employees, including Mrs. Protos. Mrs. Protos did not work and was not disciplined by Volkswagen for not working these Saturdays pending a determination by management on her request to be excused from Saturday overtime.

Beginning with her absence on Saturday, November 3, 1979, Mrs. Protos was advised

that additional absences for religious reasons would not be permitted and that any future absence would result in discipline.

After November 3, 1979, Volkswagen repeatedly instructed Mrs. Protos that she must be present every Saturday, regardless of her religious beliefs. Volkswagen however, during this same period, provided vacation time and excused absences to its employees on Saturdays, none of whom requested Saturdays off for religious reasons.

Beginning on November 9, 1979, Volkswagen began to impose its progressive discipline on Mrs. Protos for her failure to work on Saturdays. That discipline progressed as follows:

November 9, 1979 - Verbal Warning

December 10, 1979 - Written Formal Warning

February 4, 1980 - One-Week Layoff

February 25, 1980 - Two-Week Layoff

On March 17, 1980, Mrs. Protos was discharged for failing to work on Saturday, March 15, 1980.

The only reason offered to Mrs. Protos for the imposition of discipline was that another employee requested Saturday off to go small game hunting. At no time was Mrs. Protos advised that her absence created any production problems, cost Volkswagen any money or caused any hardship whatsoever.

Mrs. Protos' job assignment while employed at Volkswagen was in Trim 15, a portion of the Trim Department which, in turn, was a portion of the assembly line. Mrs. Protos' specific responsibility was to connect four color-coded wires of varying lengths to four connectors and to attach a ground screw. Mrs. Protos' job could be learned in 15 minutes and was the least difficult and strenuous job in Trim 15.

Volkswagen had several mechanisms available to deal with employee absence

while Mrs. Protos was employed there. Those mechanisms included Absentee Relief Operators, Tag Relief Operators and Area Coordinators. These employees would be available to fill in for an absent employee at the same rate of pay without hardship or any cost to Volkswagen.

Volkswagen also had numerous mechanisms in place to rectify errors or mistakes during the actual production process. These mechanisms were able to insure continued production and quality control at all times, including the Saturdays when Mrs. Protos was absent.

Volkswagen did not indicate to Mrs. Protos, at any time while she was being disciplined, that her absences were costing Volkswagen any money whatsoever. In addition, Volkswagen was unable to identify, at any time, including trial, any specific amount of money that Mrs. Protos' absences were costing Volkswagen.

Following her termination in March, 1980, Mrs. Protos filed a charge with the Equal Employment Opportunity Commission ("E.E.O.C.") alleging that she had been fired in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, et seq.

On November 17, 1981, the E.E.O.C. issued a determination that there was reasonable cause to believe that Volkswagen had violated Title VII of the Civil Rights Act of 1964 and on February 22, 1984, the E.E.O.C. issued a Notice Of Right To Sue.

The present suit was filed by Mrs. Protos on May 21, 1984 and tried without a jury before the Honorable Donald E. Ziegler from July 16, 1985 to July 24, 1985. On August 27, 1985, Judge Ziegler filed Findings of Fact and Conclusions of Law directing that judgment be entered in favor of Mrs. Protos and against Volkswagen in the sum of $73,911.36. That decision is

published at Protos v. Volkswagen of America, Inc., 615 F.Supp. 1513 (W.D. Pa. 1985).

At trial, Volkswagen presented evidence hoping to prove that efficiency, morale, production and quality were compromised as a result of Mrs. Protos' absence. The District Court's Findings of Fact rejected Volkswagen's evidence and concluded, inter alia:

- ... defendant had available, at the same rate of pay, qualified employees who were able and did perform the assignment of plaintiff during her absence, without undue hardship or de minimus cost to defendant.

- ... defendant had available, and utilized Absentee Relief Operators and Tag Relief employees to replace plaintiff without affecting the efficiency, quality or production of Trim 15 and the assembly line.

- ... defendant was able to cover the absence of plaintiff on each of the relevant days without an undue hardship indeed without any hardship whatsoever.

- ... defendant was able to replace plaintiff on each Saturday without any hardship. Normal production continued and quality control was maintained, even when the assembly line operated at an accelerated pace.

- ... defendant was able and did replace plaintiff with competent substitutes, without difficulty throughout the manufacturing process.

- ... defendant was able to conduct an efficient and routine assembly line operation on the days on which plaintiff was absent due to her religious beliefs, despite the unexplained absences of other employees.

- ... defendant was able and did procure qualified substitute employees to perform the job of plaintiff without violation or deviation from the collective bargain agreement between defendant and the United Auto Workers of America.

(See Petition at B-1 to B-7.)

On appeal, the United States Court of Appeals for the Third Circuit found that the District Court applied the correct legal standard, that the District Court's Findings

of Fact were not clearly erroneous and that the reasonable accommodation requirements of Title VII do not violate the Establishment Clause of the First Amendment.

SUMMARY OF ARGUMENT

The constitutionality of the reasonable accommodation provisions of Title VII has now been ruled on by Courts of Appeal on seven different occasions representing five different Circuits. In each of those cases, the Court has found the reasonable accommodation provisions to be constitutional by applying the tests which this Court has set out to decide challenges under the Establishment Clause. In addition, these decisions are consistent with the decisions of this Court under the Establishment Clause including the decision in the recent case of Estate of Thornton v. Caldor, Inc., 105 S.Ct. 2914 (1985).

The factual and legal questions presented by this case are unrelated to the questions presented in Ansonia Board of Education v. Philbrook, No. 85,-495, which was recently argued before this Court. For that reason, this Court should not delay disposition of this Petition until Philbrook is decided.

The factual arguments raised by Volkswagen rely on disputed evidence which was considered and rejected by the District Court and the Court of Appeals. Both lower Courts in this case have properly applied the principals set down by this Court in Trans World Airlines v. Hardison, 432 U.S. 63 (1977) and the facts as found by the Trial and Appellate Courts raise no important or novel issues.

REASONS FOR DENIAL OF WRIT

I. THE DECISION OF THE COURT OF APPEALS THAT THE REASONABLE ACCOMMODATION PROVISIONS OF TITLE VII ARE CONSTITUTIONAL IS CONSISTENT WITH THE DECISION BY EVERY COURT OF APPEALS THAT HAS REVIEWED THIS QUESTION AND WITH THE DECISIONS OF THIS COURT UNDER THE ESTABLISHMENT CLAUSE.

The question of whether the reasonable accommodation provisions of Title VII are violative of the Establishment Clause of the First Amendment is hardly a novel one. Including the present case, the various Courts of Appeal have ruled on the constitutionality of reasonable accommodation on seven occasions.[1/] In these decisions, covering five Circuits, the

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1/ Protos v. Volkswagen of America, Inc., 797 F.2d 129, 135 (3rd Cir. 1986) (see Petition at A-11); McDaniel v. Essex Intern., Inc., 696 F.2d 34, 37 (6th Cir. 1982); Anderson v. General Dynamics Convair Aerospace Div., 648 F.2d 1247, 1248 (9th Cir. 1981); Tooley v. Martin-Marietta Corp., 648 F.2d 1239, 1244-1246 (9th Cir. 1981), cert. denied, 454 U.S. 1098 (1981); Nottelson v. Smith

Courts have universally held that the duty of employers to reasonably accommodate an employee's religious beliefs does not violate the Establishment Clause.

Moreover, this Court's decision in Estate of Thornton v. Caldor, Inc., 105 S.Ct. 2914 (1985), is not only consistent with these decisions, but Thornton reinforces the Establishment Clause holdings in the Title VII cases. The Connecticut statute struck down in Thornton imposed an absolute duty on employers and employees to conform their business practices to the particular religious practices of an employee:

> The State thus commands that Sabbath religious concerns auto-

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1/ continued.

Steel Workers, 643 F.2d 445, 453-455 (7th Cir. 1981), cert. denied, 454 U.S. 1046 (1981); Hardison v. T.W.A., Inc., 527 F.2d 33, 43-44 (8th Cir. 1975), rev. on other grounds 432 U.S. 63 (1977); Cummins v. Parker Seal Co., 516 F.2d 544, 551-554 (6th Cir. 1975), affd. per curiam by an equally divided Court, 429 U.S. 65 (1976).

> matically control over all secular interests at the workplace; the statute takes no account of the convenience or interests of the employer or those of other employees who do not observe a Sabbath. Thornton, 105 S.Ct. at 2918.

Indeed, the Court specifically notes that, "the statute allows for no consideration as to whether the employer has made reasonable accommodation proposals." (Emphasis added.) Thornton, 105 S.Ct. at 2918. It is clear that the Court in Thornton held that it was the absolute nature of the statute that violated the Establishment Clause and also held, by implication, that a reasonable accommodation statute would produce a different result.

While this Court has never directly passed on the constitutionality of the reasonable accommodation provisions of Title VII, three members of this Court have previously written to confirm that it would pass constitutional muster. In Trans World

Airlines, Inc. v. Hardison, 432 U.S. 63 (1977), Justices Marshall and Brennan wrote in dissent after the majority had, by its decision, not reached the constitutional issue:

> If the State does not establish religion over non-religion by excusing religious practitioners from obligations owed the State, I do not see how the State can be said to establish religion by requiring employers to do the same with respect to obligations owed the employer. Thus, I think it beyond dispute that the Act does -- and, consistently with the First Amendment, can -- require employers to grant privileges to religious observers as part of the accommodating process. 432 U.S. at 90-91.

Then, in Thornton, Justices O'Connor and Marshall wrote in concurring:

> I do not read the Court's opinion as suggesting that the religious accommodation provisions of Title VII of the Civil Rights Act are similarly invalid.... Since Title VII calls for reasonable rather than absolute accommodation and extends that requirement to all religious beliefs and practices rather than protecting only the

> Sabbath observance, I believe an objective observer would perceive it as an anti-discrimination law rather than an endorsement of religion or a particular religious practice. 105 S.Ct. at 2919.

Volkswagen's primary concern in its constitutional challenge is that reasonable accommodation conveys an "economic benefit" on Mrs. Protos. To the contrary, if Volkswagen had complied with the reasonable accommodation provisions of Title VII, Mrs. Protos would not have economically benefited but would have avoided a severe economic penalty by retaining her employment. And, even if retaining her employment is considered a "benefit", it is certainly the kind of incidental benefit that this Court has traditionally permitted where Establishment Clause challenges have been rejected. Everson v. Board of Education of Ewing Twp., 330 U.S. 1 (1947) (Parents of parochial school students would save transportation expenses.); Wisconsin v. Yoder,

406 U.S. 205 (1972) (Amish children not in school could contribute additional economic benefit to their families.); Sherbert v. Verner, 374 U.S. 398 (1963) (Seventh-Day Adventists permitted greater choice in determining day of week to be free of employment responsibilities); Gillette v. United States, 401 U.S. 424 (1971) (Conscientious objectors could avoid combat services.); Walz v. Tax Commission, 397 U.S. 664 (1970) (Tax exempt institutions avoid payment of property taxes).

Finally, any perceived benefit to Mrs. Protos [2/] is certainly outweighed where, as here, Congress attempts to:

> accommodate free exercise values, in line with "our happy tradition" of "avoiding unnecessary clashes with the dictates of conscience". Gillette v. United States, supra, 401 U.S. at 453.

2/ It should be noted that any benefit in this regard was minimal. Since Mrs. Protos was terminated, Volkswagen has scheduled Saturday over-time on only eight occasions in nearly six years, or

II. THE UNDUE HARDSHIP QUESTION IN THIS CASE IS UNRELATED TO THE QUESTIONS PRESENTED IN ANSONIA BOARD OF EDUCATION V. PHILBROOK.

This Court, on October 14, 1986, heard argument in the case of Ansonia Board of Education v. Philbrook, No. 85-495. While that case has some elements in common with this case, its issues are fundamentally different and its disposition will be little, if any, assistance in deciding this case.

Philbrook, as this Court is aware, poses the question of whether an employer can be required to accept the employee's proposed accommodation where the employer has already presented its own reasonable accommodation. In that case, the employer had agreed to give the employee any time required for religious observance. The employer's

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2/ continued.

an average of slightly more than once a year.

proposed accommodation, however, only included three days of paid leave and provided that additional leave would be unpaid.

In the present case, Mrs. Protos would have, at all times, happily accepted unpaid leave. Volkswagen, however, made it clear that no leave was possible, paid or unpaid. Hence, Mrs. Protos never had the accommodation available to Philbrook and was faced with the Hobson's choice that Title VII was intended to prevent: Your Religion or Your Job.

Since the questions presented in Philbrook are so remote from the present case, delaying the decision in this case until Philbrook is decided would only further postpone justice for Mrs. Protos who filed her charge of discrimination nearly seven years ago.[3/] Even without further

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3/ That charge was filed November 23, 1979. (See J.A. 677).

delays, Mrs. Protos has certainly waited long enough to have her rights under Title VII determined. Justice delayed in this context provides little protection for victims of illegal discrimination and even less deterrent to those responsible for the serious injuries sustained by wrongly terminated employees.

III. THE STANDARDS SET DOWN BY THIS COURT IN TRANS WORLD AIRLINES V. HARDISON WERE PROPERLY APPLIED IN THIS CASE AND PETITIONER'S ARGUMENT TO THE CONTRARY RELIES ON AN INACCURATE AND INCOMPLETE RECITATION OF THE FACTS AND RAISES NO IMPORTANT OR NOVEL ISSUES.

Volkswagen urges this Court to conclude that the District Court and the Court of Appeals erred in not holding that a request to not work on any Saturday is "unreasonable" per se and thus does not require accommodation. Volkswagen also urges that this Court reject the factual findings of

both lower Courts. These contentions will be discussed seriatim.

A.

In Jordan v. North Carolina Nat. Bank, 565 F.2d 72 (4th Cir. 1977), the Fourth Circuit held that an employee whose sincerely held religious beliefs required that she not work on Saturdays could not be reasonably accommodated and that such a request was beyond accommodation. This "per se unreasonable" rule has not been adopted by any other Court despite the fact that the most frequently requested accommodation is that the employee be permitted to observe the Sabbath by not working.

The Court of Appeals in this case rejected the Jordan analysis by holding:

> To interpret Title VII in this fashion would effectively remove from the statute's protection all employees who subscribe to religions with strict prohibitions against Sabbath labor. By its terms, however, §701(j) encompasses

> within its scope "all aspects of religious observance and practice, as well as belief," and the EEOC guideline after which it was modeled specifically referred to observation of the Sabbath as an example of a protected observance, see 29 C.F.R. §1605.1 (1968). Indeed, the Hardison court itself proceeded on the premise that a Sabbath observer was entitled to be accommodated by her employer, and that the only question was "the reach of that obligation" on the part of the employer. 432 U.S. at 66, 97 S.Ct. at 2268. Protos v. Volkswagen of America, Inc., supra, 797 F.2d at 134. (See Petition at A-9.)

Moreover, the District Court concluded, after reviewing Jordan, that the dissent in that case presented the better analysis. In that dissent, Judge Winter wrote:

> There is not any question but that plaintiff, pursuant to her religious beliefs, would absolutely decline to work on Saturday. Her request for a "guarantee" is both an expression of the firmness and sincerity of her beliefs and fair notice to the Bank or any other employer that she could not comply with any order or direction to work on Saturday, lest the Bank or that employer think otherwise.

> But this is the beginning of the case, not the solution. It is the premise which invokes the Act and the regulation, for lacking one who has religious beliefs of the unbending nature of those held by plaintiff, neither Congress nor the Commission would have occasion to say that an employer has the duty to accommodate an employee's religious beliefs unless such accommodation would visit "undue hardship on the conduct of the employer's business." Jordan v. North Carolina Nat. Bank, supra, (Winter, J., dissenting)

The wise rejection of Jordan by both the District Court and the Court of Appeals should not be disturbed.

B.

Volkswagen's final contentions are nothing more than its desire to re-litigate the very facts that it presented at trial and which were rejected by the District Court. This Court has specifically cautioned Appellate Courts against conducting this kind of plenary review of findings made by a Trial Court:

> When findings are based on determinations regarding the credibility of witnesses, Rule 52 demands even greater deference to the trial court's findings; for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said.
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> But when a trial judge's finding is based on his decision to credit the testimony of one or two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error. Anderson v. City of Bessemer, 105 S.Ct. 1504, 1511-1513. (1985).

The Court of Appeals specifically noted that the criteria for deference noted in Anderson were present here:

> Moreover, in this case, the Trial Court's conclusion depended heavily on its assessment of the witnesses' credibility, and deference to the trial court is most warranted where such credibility determinations are at issue. Protos, supra, 797 at F.2d at 135, n. 3. (See Petition at A-11.)

Specifically, Volkswagen complains that the Court did not give sufficient weight to evidence:

> that there were numerous employees who wanted to take Saturdays off for secular reasons (such as hunting) and who complained when they were required to work while Mrs. Protos was excused. (See Petition at page 17.)

To the contrary, that evidence was unequivocally rejected by the Trial Court who held that complaints by one employee did not affect the routine operation of the assembly line or cause a hardship, de minimus or otherwise, to defendants. (Finding of Fact 24, see Petition at B-5 to B-6.)

Volkswagen also contends that the Court failed to consider the problems confronting Volkswagen due to increased absenteeism by other employees. This is also simply not the case. In the relevant finding of fact the Court found:

> ... defendant was able to conduct an efficient and routine assembly

> line operation on the days on which plaintiff was absent due to her religious beliefs, <u>despite the unexplained absences of other employees</u>. (Emphasis Added.)(Finding of Fact 26, see Petition at B-6).

Moreover, in urging that it has shown an undue hardship by simply showing that there were others also absent with Mrs. Protos, Volkswagen clearly misstates the reasonable accommodation requirements of Title VII. Volkswagen can refuse to accommodate Mrs. Protos where to do so would constitute an undue hardship, but attendance statistics alone can never show an undue hardship. For example, if an employer has ten employees and one does not work for religious reasons, there may be no undue hardship if the nine who do work perform all needed tasks. Only if the remaining employees are unable to perform the necessary work might an undue hardship be shown.

Volkswagen has not been able to show that Mrs. Protos' absence, even with the absences of other employees, had any effect on the production, efficiency or quality of the assembly line. The Trial Court so found and its findings were based on the overwhelming weight of the testimony and documentary evidence. The Court of Appeals, pursuant to Rule 52(a) of the Federal Rules of Civil Procedure, refused to disturb those findings and this Court should reach the identical conclusion.

CONCLUSION

For the reasons stated above, Respondent requests that Certiorari be denied.

Respectfully submitted,

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